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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	)	CC Docket No. 92-26

COMMENTS OF
THE NORTH AMERICAN TELECOMMUNICATIONS ASSOCIATION

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NORTH AMERICAN TELECOMMUNICATIONS ASSOCIATION
IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

The North American Telecommunications Association ("NATA") submits these Comments in response to the Notice of Proposed Rulemaking ("NPRM")[1] released by the Federal Communications Commission ("FCC" or "Commission") in this docket on March 12, 1992.

NATA is a non-profit trade association that represents the "interconnect" industry. The interconnect industry comprises manufacturers, distributors, retailers, installers and servicers of customer premises equipment ("CPE"). NATA's members essentially serve a substantial market not supplied by regulated telephone companies. NATA's over 700 members range from manufacturers and suppliers of CPE to small companies engaged solely in the retail sale, installation and maintenance of such equipment.

NATA was organized in part to protect and preserve the public interest in competitive alternatives for users of telecommunications equipment and services, and to represent the

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[1] In re Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, FCC 92-59 (March 12, 1992) (hereinafter "NPRM").

interests of the interconnect industry in legal and regulatory matters that affect those interests. NATA has actively participated before federal and state regulatory commissions, courts and legislatures in major proceedings during the past two decades through which the telecommunications industry has been opened to competition.

SUMMARY

In general, NATA agrees with the Commission's goal of more timely resolution of formal complaints[2]. Efficient processing of complaint cases before the Commission is generally beneficial to all parties involved. Efficiency does not, however, equate with speed, and speed is no substitute for justice. In its efforts to improve the process, NATA urges the Commission to be careful that speedy resolution of formal complaints does not take the place of ensuring a fair hearing of the issues.

The Commission has, on several occasions, observed that it is going to have to rely increasingly on the complaint process, in light of deregulation and further carrier integration, to oversee specific abuses and to deal with disputes involving carriers and their customers. The direction now being taken is one in which the Commission declines to adopt structural rules. The Commission must, therefore, adopt a meaningful complaint process. Otherwise, the Commission will be unable to enforce its rules or to encourage

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[2] NPRM, paragraph 1.

parties to bring violations of its rules to the Commission's attention.

I. The Fact Finding Nature of the Complaint Process must be Recognized and Encouraged

Particularly in an environment in which formal complaints are relied upon to detect and correct abuses by regulated companies, it must be recognized that the formal complaint process is intrinsically fact-intensive. NATA recognizes that the Commission's complaint process is not the same as federal district court procedure where notice pleading is satisfactory. When a formal complaint is filed with the Commission, however, the underlying facts may not be available to the complainant, and the Commission cannot predicate rules on the assumption that the facts are available.

Suppose, for example, that a complainant alleges that a carrier is cross-subsidizing unregulated activities. The only evidence available to the complainant is price, the complainant's own knowledge of the economics of the industry, cost of goods sold, and similar information. In order to prove improper allocation, the complainant will need access to the carrier's books and records regarding the particular transaction(s). Similarly, if it is alleged that a carrier improperly used CPNI (customer proprietary network information) for its own competitive operations, proving that allegation requires information which is in the exclusive

control of the carrier.[3] These types of cases require determination of the facts, such as how transactions are recorded in a carrier's books, or how CPNI is used and transmitted between a carrier's monopoly and competitive operations. Further, these cases require specific testimony and other evidence from personnel and records involved in a particular transaction. Absent such fact determination, the Commission will be left to decide cases based on inference and what is believed to be true about a particular aspect of the industry, rather than what happened in a particular case.

The current formal complaint rules do little to facilitate private enforcement of Commission policy; further restrictions on complaint procedures will further hinder enforcement. If the Commission intends for the formal complaint process to be the means of enforcement, the Commission must allow parties the opportunity to use the Commission's processes to prove their cases. The Commission is concerned that "complainants are filing marginally acceptable complaints to initiate a proceeding, apparently counting on establishing the basic factual underpinnings of their case through subsequent pleadings or discovery."[4] As illustrated in the above examples, however, the Commission must recognize that the

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[3] See, e.g., informal complaint of Voice-Tel of Southern Florida against Southern Bell, dated February 21, 1992.

[4] NPRM, paragraph 10.

underlying facts may be unavailable to the complainant and that the opportunity to determine the facts must remain available.[5]

If the Commission's process is to be effective for enforcement of the FCC's rules, it should not be made more difficult for complainants to bring a complaint to the Commission; rather it should be made easier. The fact finding process must not be eliminated or further curtailed. Absent adequate procedures for ensuring fair and complete hearing of the issues, the Commission would be abdicating its regulatory function. The Commission is the specialized agency to which the public can come when it seeks redress of abuses of carriers regulated by the Commission. There should, therefore, be broad rights for complainants contained in the Commission's rules.

The Commission's proposed revisions to the formal complaint rules emphasize speed of resolution at the expense of establishing a procedure through which the Commission can make reasoned decisions regarding important competitive issues. Complainants bear the ultimate burden of proof with respect to their claims, and they need the discovery and procedural tools to sustain that

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[5] NATA shares the Commission's concern that frivolous complaints could slow down the overall process and prevent the Commission from reaching the pressing issues regarding the competitive marketplace which must be addressed. The solution to the filing of frivolous complaints, however, is not shutting down the entire process, but rather is managing cases so that frivolous cases can be sifted out. Moreover, the Commission must take care that legitimate complaints are not erroneously categorized as frivolous merely because the complainant does not have access to the underlying facts at the beginning of the complaint process.

burden. The new formal complaint rules should not merely hold the parties at bay; they should foster the meaningful resolution of disputes. In particular, the restricted, limited nature of discovery allowed by the proposed rules reflects an overly restricted view of the Commission's responsibility.

II. Use of Discovery Should be Expanded

Generally, the discovery and pleading techniques found in court proceedings and codified by the Federal Rules of Civil Procedure ("FRCP") are key to the fact finding process. In NATA's experience, these procedures have expedited the litigation process by focusing the tribunal's attention on the key issues germane to the litigation. Also, they have made the complaint process simpler and easier for litigants to utilize. Because of the Commission's increasing reliance on the formal complaint process as a regulatory oversight tool, the Commission should preserve and expand the discovery procedures found in its rules.

A. The "Self-Executing" Aspect of the Current Rules Should be Continued, and Should be Expanded to Include Document Production and Depositions

First, elimination of discovery unless staff orders it would be intolerable. As noted above, it is through discovery that parties are able to elicit specific factual information necessary for a fair resolution of the issues. As the foregoing examples illustrate, the notion that parties will know all the facts at the time of filing a complaint is both facile and unwarranted. Depositions, interrogatories, and document production, as those

tools have been used in the courts, have long provided an appropriate, useful framework within which to gather information critical, or certainly useful, to the complaint process. The "self-executing" aspect of the current rules, whereby parties may serve written interrogatories on each other without prior leave of the commission, helps expedite the complaint process. The fact finding process would be improved, however, if document production and the taking of depositions were also made "self-executing," instead of requiring permission to use these tools.

Often, the discovery necessary to support a complaint requires production of documents which explain the basis for actions taken by the common carriers. For example, a complaint may be voiced about a particular practice or policy undertaken by common carriers, citing oral statements by common carrier officials. However, it is usually impossible to document these practices or policies, without engaging in a long, drawn out, battle with the common carriers. NATA would extend the "self-executing" mechanism of discovery proposed by these rules, so that any and all documents bearing upon the practice complained of would, automatically and without specific Commission authorization, be produced by the carriers. In other words, the self-executing discovery provisions should include not only interrogatories, but also document production. Such a modification to the discovery rules would ultimately be more efficient by allowing more complete discovery from the start, rather than delaying the process while additional

documentary evidence is extracted piecemeal from the common carriers.

Although the taking of depositions can be burdensome and time-consuming, it is often essential if complainants are to produce a meaningful factual record, particularly if documents do not shed light on the basis for a common carrier practice or policy. Depositions should be a liberally available discovery tool, unless the party to be deposed applies for, and obtains, Commission approval to quash or limit the scope of the deposition.

B. The Proposed Time Period During which Discovery may be Conducted Should not be Shortened

The proposed revision would limit the discovery period to the twenty day period following the filing of an answer. The limited time in which discovery is permitted would, at first glance, appear to expedite proceedings; it is likely, however, to have the unintended effect of preventing fair hearing of the issues. It may easily happen that the need for additional information is not apparent until an initial round of discovery is conducted. A more realistic approach may be to allow more than one round of discovery. Determination of how discovery will proceed in a particular complaint case can easily be handled in status conferences.

C. Discovery Should Continue to be Filed with the Commission

The NPRM also proposes eliminating the filing of discovery with the Commission, unless ordered otherwise. While this is a common practice in the courts, it may not be reasonable for complaint cases before the Commission unless a hearing is held. In the courts, relevant discovery may be used to support a party's case at the hearing. In this way, factual information important for the decision-maker is brought forward. Unless the Commission holds hearings in complaint cases, however, important facts may not be brought to the Commission's attention in as effective a manner. Eliminating Commission involvement with the facts of the case precludes fact-based decisions and prevents the Commission from learning relevant details about the companies it regulates. Further, putting discovery on the record aids other parties, improving the quality of the facts and pleadings, and eliminating the need for repeated discovery.

D. The Relevance Objection to Discovery Should be Preserved

An additional proposal on which comment was requested was the possibility of eliminating relevance as a ground for objections to discovery, and deeming failure to answer to be an admission. A revision to the rules which would preclude an objection based on relevance would open the door for "fishing expeditions" into a party's business. Not only is the proposal unfair and unreasonable, it would be a waste of the Commission's and the parties' resources to spend time on irrelevant matters. Wasting

time on irrelevant matters also flies in the face of the Commission's stated goal of expediting the formal complaint process. Moreover, NATA questions the ease of determining what could be deemed admitted in an interrogatory. If, for example, a carrier is asked about screening capabilities of its switches, would the carrier be deemed to admit that it could, or that it could not, screen a particular call? Adoption of a rule which would preclude the relevance objection to discovery would only force parties to focus on drafting discovery for purposes of gaining an admission rather than for purposes of obtaining the facts.

E. Bifurcation of Complaint Cases is Acceptable so Long as Parties are Allowed the Opportunity to Determine Facts in Both Phases of the Case

The Commission also proposed that no discovery on the issue of damages be permitted until a finding of liability has been made. NATA has no objection at this time to bifurcating proceedings on the question of damages provided that parties are given the opportunity to make a fair determination of both the initial facts upon which liability is based and the damages incurred once liability is determined.

III. Standardization of Procedures for Handling Proprietary Material will Assist in More Efficient Processing of Sensitive Information

NATA agrees that the standardization of procedures for handling proprietary information would eliminate protracted disputes over handling sensitive information. By standardizing

procedures, including the individuals to whom information may be disclosed, the Commission would save decision-making time in this area for those instances where unique circumstances require special attention. A party's designation of proprietary information should not, however, be determinative of the appropriate classification of the information, and if challenged, the party designating the information as proprietary bears the burden of proof.

IV. Replies to Briefs and Oppositions must be Continued

The Commission proposes elimination of reply briefs unless discovery has taken place, and the elimination of replies to oppositions to motions. NATA opposes elimination of replies. Parties must be given the opportunity to respond to claims made by opposing parties, and must be allowed to develop a complete record on which a fact based decision can be made.

CONCLUSION

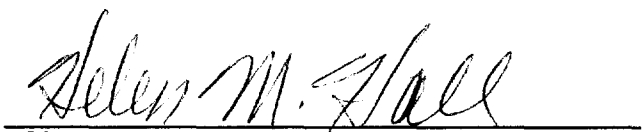
The Commission's proposed changes to the formal complaint rules generally shorten time periods and limit available tools for obtaining the facts necessary to make a reasoned decision. If the goal of these changes in the rules is more timely resolution of complaints, a more effective and flexible alternative to the proposed revisions would be to make more use of status conferences. The same objectives could be accomplished without the proposed revisions. Through the use of status conferences, ALJs and/or staff would have the flexibility to set time frames and appropriate limits on discovery, and, in general, to manage the process.

Status conferences could be used to resolve disputes quickly, and to keep the process moving. Management of the complaint process, rather than restrictive rules which preclude adequate fact finding will permit use of the formal complaint process as an enforcement tool. Enforcement cannot be expected to be adequate if the tools to ensure it are restricted or eliminated. Furthermore, the Commission cannot expect that private enforcement of its rules will be effective if the means of bringing an action continues to be truncated.

NATA urges the Commission to expand the discovery options available in the formal complaint process, as outlined above. The time during which discovery may be conducted should remain flexible, and should not be shortened as proposed. In addition, parties should continue to be required to file discovery with the Commission. Objections to discovery based on relevance should remain available, as should the option to reply to briefs or

oppositions of opposing parties. The proposed standardization of procedures for handling proprietary information should be adopted, with the additional provisions noted above.

Respectfully submitted,



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